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ABSTRACT

The application of constitutional doctrines to controversies involving higher education institutions and legal theories emanating from the Supreme Court are discussed. The historical review covers academic freedom at colleges, or freedom from political interference of of outside intervention: freedom of speech or association in colleges and universities; the rights of students; the rights and interests of a private college; equal opportunity in the academy; and procedural rights for faculty and students. Constitutional decisions regarding academic freedom have struck down loyalty oaths for college staff, intrusive reporting requirements, and restrictions on political activity. The Supreme Court has protected the right of a student editor to publish controversial material. The controversies today concern the future of predominantly or historically black colleges, full integration of colleges that have been closed or hostile to minorities, and the question of whether sex discrimination in educational programs can be barred. Redefinitions of relationships in academia have resulted from Supreme Court decisions, including students' relationships with colleges and universities and the rights and responsibilities of faculty and staff. (SW)

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THE SUPREME COURT AND ACADEME:
THE EVOLUTION OF CONSTITUTIONAL DOCTRINES FOR HIGHER EDUCATION

PRESENTED TO:

ASSOCIATION FOR THE STUDY OF HIGHER EDUCATION

ERIC R. GILBERTSON

MARCH, 1985

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Paper presented to
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THE SUPREME COURT AND ACADEME:
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> Persons of good sense, I have since observed, seldom fall into disputation, except lawyers, university men, and men of all sorts that have been bred at Edinburgh.
>
> Ben Franklin
> Autobiography, Ch.1

It is likely that more has been said and written about legal issues in higher education -- alas -- over the past decade or so than about general education, or basic research, or governance, or pedagogy, or just about anything else. This attention may well be warranted -- in recent times the law, perhaps as much as any single force, has reshaped relationships of people within academic institutions in ways both dramatic and irreversible.

If a modern watershed date could be identified, it might be the occasion of a federal court decision in 1967, holding that a student enrolled in a state-assisted institution of higher education could not be dismissed for disciplinary reasons without rudimentary procedural protections -- this, under the "due process clause" of the 14th Amendment to the U.S. Constitution.[1] What followed was a floodtide of litigation over the constitutional rights of students, then faculty, then everyone else associated with colleges and universities.

Later, in the early 1970's, the legislative branches of government began to lavish attention -- albeit often unwelcome -- upon colleges and universities. From the states came punitive legislation aimed at campus disruption, public employees' collective bargaining laws, open meeting laws, statewide regulatory or governance systems, and statutes granting or withholding power or influence in governance for constituent groups. From the Congress came Title IX of the 1972 Education Amendments, the Family Education Rights and Privacy Act of 1974 and, more recently, the "Solomon Amendment," and every new law breeds litigation.

One measure of change may well be the number and variety of intramural disputes taken to the courts for resolution today. While the courts do not initiate or welcome disputes from within academe, they have been compelled to pass judgment upon almost every aspect of life in the academy. In recent months, for example, courts have been called upon to decide:

*Whether student-athletes receiving grants-in-aid were "employees" entitled to workmen's compensation benefits for their injuries? (holding generally that they were not);[2]

*Whether a faculty member who was given an additional year in a "tenure track" to demonstrate scholarship and who thereafter published two articles was entitled to tenure? (she was);[3]

*Whether a university may ban commercial sales activities within residence halls? (the courts are split);[4]

*Whether a graduate assistant who was having an affair with an undergraduate student could successfully challenge, on grounds of alleged discrimination, a reassignment from teaching to research duties? (her suit failed);[5]

*Whether a public university could change the funding support of a student newspaper in response to the publication of offensive material? (it could not);[6]

*Whether a state legislature acted properly to change the name of a state college? (it did);[7]

*Whether the names and qualifications of candidates for a university presidency were subject to a state open records statute? (in Texas they were);[8]

*Whether appointments to positions in student governance bodies could be conditioned on race? (they could not);[9]

*Whether a student could successfully sue an institution and its faculty for conspiracy in withholding recommendations and for the negligent supervision of her graduate studies? (she could not);[10]

*Whether a professor had a constitutionally-protected interest in remaining a department chairman? (he did not);[11]

*Whether a college could be successfully sued for libelous statements appearing in a student newspaper, when it was barred

by the First Amendment from exercising editorial control over that publication? (it could not);[12]

*Whether a faculty member could maintain a suit against a college president based on a warning letter concerning the classroom discussion of controversial college matters? (he could);[13]

*Whether the refusal of a university to allow a medical student to retake an examination deprived the student of constitutionally-protected rights? (it did);[14] and

*Whether a public university could prohibit the use of student fees to sponsor the showing of an "x-rated" film? (it could not).[15]

And this recitation could go on, and on.

It now seems clear that many relationships within academic institutions which had been governed by tradition or by a body of common understandings have since been defined by the law. These relationships are now essentially contractual, or based on constitutional principles setting forth a citizen's rights vis-a-vis his or her government, or regulated by statute or rule akin to those protecting consumers in commercial transactions. For

better or worse, and it is probably some of both, things are not what they used to be.

In assessing the impact of the law during the last three decades in higher education, we might consider some of the very fundamental ways which colleges and universities themselves have changed.

In that not too distant past, students were wards of colleges and universities, our institutions standing in the stead of their parents. Disciplinary authority and the discretion of the institutions were considered nearly absolute, beyond challenge -- likewise, academic policies and practices.

Enlightened policies concerning freedom of expression on campus are also a surprisingly recent phenomenon. "Speakers rules" and the like were largely unchallenged until the 1960's; the First Amendment rights of academics (and others) were not at all secure from external threat during the 1950's and even beyond; academic freedom was a European concept protected largely by custom and conviction rather than force of law.[16]

Through the 1950's much of our nation still operated segregated systems of public education, including higher education. Blacks were openly excluded -- whether under de facto or de jure systems -- and women were securely "in their places" -- wherever that was. The academic professions were almost exclusively all white and all male, and no one seemed to think it should be any other way.

Today it seems accepted that the First Amendment does not "stop at the schoolhouse gate." And while the limits of academic freedom -- as protected by the Constitution -- are not yet clear, it is certain that the freedom to teach, to research and to publish one's views are entitled to special Constitutional protection.

The relationships between faculty and their institutions are no longer defined only by a bundle of traditions or understandings. Rather, these relationships are now much more formalized -- at least in part in response to the questions that were answered or left unanswered by Supreme Court decisions setting constitutional parameters.

16a

The relationships between institutions and their students are now also largely contractual. The terms of these "contracts" certainly must pass constitutional muster; but they are set forth in some detail -- perhaps excessive detail. The right of students to speak, to criticize and to publish their views is now well established; procedures for arbitrating student rights -- whether academic or conduct-related -- are specifically set forth in catalogues and student handbooks. And superimposed over all of these are federal and state statutes defining aspect of these relationships in terms of consumers' protection, rather than tender paternalism for learners in halls of ivy.

The United States Supreme Court has, historically, been called upon to decide numerous questions arising from the higher education community. And there can be little doubt that these problems have been among the most vexing faced by the Court -- particularly because of the context in which they arise.[16b]

Recent attention, for example, has focused on four celebrated decisions rendered during the 1984 term of the Court. These involved the limitations on the federal regulation of

programs and activities when those programs and activities did not receive direct federal funding,[17] the constitutionality of a state statute which excluded from formal governance systems faculty other than those selected by a certified collective bargaining agent,[17a] the constitutionality of an Act of Congress requiring male students to verify their compliance with selective service registration as a precondition to eligibility for federal financial aid programs,[17b] and the applicability of federal antitrust laws to broadcasting agreements for intercollegiate athletic events.[17c]

In considering questions from the academy -- over nearly 165 years -- the Supreme Court has consistently demonstrated a unique and surprisingly sensitive understanding of critical issues -- academic freedom, the rights of individuals versus those of the institutions, equality of opportunity, the special nature of institutional governance. And these decisions have been of tremendous importance in defining academe as it is today, and as it will be.

Because Supreme Court decisions become the most authoritative precedent followed by lower courts, and because these decisions become the primary basis for the application of constitutional principles, a review of the Court's treatment of some key issues arising from the academe may lend perspective on how things have come to this point in history.[18] These include the development of constitutional doctrines for the understanding of academic freedom, equality of opportunity, and rights of due process in academe.

Because the Constitution, and more specifically the Bill of Rights, is applicable to institutions of higher education through the 14th Amendment, and because the 14th Amendment applies to "state action," the Constitutional doctrines developed through the Court's ruling have facial applicability only to state-supported institutions of higher education. Though much has been discussed about the public purposes of private institutions -- particularly given the various mechanisms by which public funding flows to private institutions -- the Courts have heretofore not held private institutions

subject to the proscriptions of the 14th Amendment's equal protection or due process clauses. The original distinction in this regard, has been traced back to Mr. Justice Marshall's opinion in the Dartmouth College case.[18a]

For now, whatever the real or imagined public purposes of private institutions, distinction is a significant one in the constitutional law. It should also be noted, however, that faculty and students at private institutions -- as citizens everywhere -- do enjoy the full constitutional protections against improper governmental regulations of their personal or professional activities. Likewise, private institutions -- since the time of the Dartmouth College case -- enjoy constitutional protection against unwarranted government intrusion -- particularly in those areas that directly or indirectly involve the exercise of academic freedom.

The analysis which follows, therefore, is applicable with full force to students, faculty and others at public institutions of higher education -- where the institution itself is the arm of the "state," and therefore subject to the

proscriptions of the 14th Amendment. The relationship between faculty and students and private institutions for higher education remains primarily contractual in nature. The terms and conditions of those contractual arrangements have to date not been subjected to constitutional requirements.

I. A CONSTITUTIONAL DOCTRINE OF ACADEMIC FREEDOM

> "Congress shall make no law ... abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." United States Constitution, Amendment I.

The celebrated "Dartmouth College case,"[19] reached the nation's highest Court in 1819. This controversy, which featured the oratory of Daniel Webster ("Tis a small College sir, but there are those of us who love her."), involved the charter granted to Dartmouth College by the British Crown. The Legislature of the State of New Hampshire provided for the public takeover of that institution on the theory that its charter had been invalidated by the Revolutionary War. The Supreme Court, however, held that the legislative act was unconstitutional, and that this charter was an enforceable "contract" under Article I of the Constitution.

Webster's arguments in this case are worth noting in that they raised squarely the need for a public policy to protect the freedom and independence of such institutions. Without such a policy, donors -- such as one Dr. Wheelock, whose benefaction created Dartmouth -- would be deterred.

Webster argued that:

> "(T)he case before the court is not of ordinary importance, nor an everyday occurrence. It affects not this College only, but every college, and all the literary institutions in the Country. They have flourished, hitherto, and have become in a high degree respectable and useful to the community. They all have a common principle of existence, the inviolability of their charters. It will be a dangerous, a most dangerous, experiment, to hold these institutions subject to the rise and fall of popular parties, the fluctuation political parties. .... Benefactors will have no certainty of effecting the object of their bounty; and men will be deterred from devoting themselves to the service of such institutions, from the precarious title of their offices. Colleges and halls will be deserted by all better spirits, and become a theatre for the contention of politics; party and faction will be cherished and the places consecrated to piety and learning."[20]

Webster also noted that:

> "(T)he numerous academies in New England have been established in substantially the same manner. They hold their property by the same tenure, and no other. Nor has Harvard College any surer title than Dartmouth College; it may today, have more friends, but tomorrow it may have more enemies; its legal rights are the same. Also at Yale College . . . ."[21]

The same might be said today of others with even fewer friends than Harvard or Yale.

Justice Marshall, writing for the Court, found that "it is probable that no man ever was, and no man ever will be, a founder of a College, believing at the time, that an act of incorporation constitutes no security for the institution; believing, that it is immediately to be deemed a public institution, whose funds are to be governed and applied, not by the will of the donor, but by the will of the Legislature."[22]

Thus, the Justices of the Supreme Court recognized early that the academy was something special -- something more than other organizations, or businesses, something that served its purposes only when free from political interference or threat of external intervention.[23]

This special solicitude evidenced by the Court on behalf of the rights of private colleges and universities, first evidenced in the Dartmouth College case, was slow in evolving to a more generalized concern for academic freedom -- whether at public or private institutions. What did subsequently evolve is a constitutionally-based protection for the rights of individuals

within academic institutions -- often in conflict with those institutions -- and for such institutions themselves.

A. The Rights of Academics

Decisions recognizing the importance of freedom of speech or association in institutions of higher education began to emerge from the Court in the 1950's. In Slochower vs. Board of Higher Education of New York City,[24] the Court was called upon to decide whether a tenured teacher in a public college could be summarily discharged without notice or hearing because he refused to answer a legislative committee's questions concerning his membership in the Communist Party some 15 years earlier.

In holding that Professor Slochower's constitutional rights had been improperly trammeled, the Court ruled that while City authorities were permitted to scrutinize a person's fitness to hold a public position, they could not do so without affording procedural protections. Professor Slochower's refusal to answer questions "admittedly asked for a purpose wholly unrelated to his college functions"[25] provided no permissable basis under which he could be discharged from his academic appointment.

While the Court did not specifically address the substantive question of Professor Slochower's right to believe or teach an unpopular political and economic doctrine, the clear implication of its decision was that academics -- or other public employees -- could not, under the 14th Amendment, be summarily dismissed for the exercise of protected constitutional rights.

Shortly thereafter, in Sweezy vs. New Hampshire,[26] the Court was faced with the question of whether the Attorney General of New Hampshire could prosecute an individual for refusal to answer questions at a lecture delivered at the state university or concerning the Progressive Party of the United States. The Attorney General had a clear grant of Legislative authority to compel testimony. The laws in question, passed by the New Hampshire Legislature in 1951, provided for a comprehensive scheme of regulation of "subversive activities." "Subversive persons" were made ineligible for employment by the state government, including public educational institutions.

Sweezy had refused to disclose his knowledge of the Progressive Party in New Hampshire, and declined to answer questions as to the subject of his lecture in a humanities course at the University of New Hampshire. Specifically, he was asked whether he had asserted in that lecture "that Socialism was inevitable, whether he had advocated Marxism, or whether he had espoused the theories of dialectical materialism."

In holding that Sweezy could not be prosecuted for contempt in refusing to answer these questions, Chief Justice Warren, for the Court, noted that:

> "The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in democracy that is played by those who guide and train our youth. To impose any straitjacket upon the intellectual leaders in our colleges and universities would imperil the future of our nation. No field of education is so thoroughly comprehended by man that new discoveries cannot be made. Particularly is that true in the social sciences, where few, if any principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."[27]

The Court found nothing to connect the questions which had been posed to Sweezy with any legitimate interest of the State. Moreover, the Court found that before any such intrusion into

such matters of personal liberty could be legitimate, the State must be able to demonstrate its "fundamental interest" -- and New Hampshire had clearly not done so in this instance.

In a concurring opinion, Mr. Justice Frankfurter, himself a former Harvard professor, noted that:

> "When weighed against the grave harm resulting from government intrusion into the intellectual life of a university, such justification for compelling a witness to discuss the contents of his lecture appears grossly inadequate .... Progress in the natural sciences is not remotely confined to findings made in the laboratory. Insights into the mysteries of nature are born of hypothesis and speculation. The more is this true in the pursuit of understanding and the groping endeavors of what are called the social sciences, the concern of which is man and society. The problems that are the respective preoccupations of anthropology, economics, law, psychology, sociology and related areas of scholarship are merely departmentalized dealing, by way of manageable division of analysis, with interpenetrating aspects of holistic perplexities. For society's good -- if understanding is an essential need of society -- inquiries into these problems, speculations about them, stimulation in others of reflection upon them, must be left as unfettered as possible. Political power must abstain from intrusion into this activity of freedom, pursued in the interest of wise government and the people's well being, except for reasons that are exigent and obviously compelling."[28]

Likewise, a few years later, in Shelton vs. Tucker,[29] the Supreme Court struck down an Arkansas statute which required every teacher, as a condition of employment at a state-supported school or college, to file annually an affidavit listing every

organization to which he or she had belonged or regularly contributed in the preceeding five years. The contract of certain teachers had not been re-employed when they refused to file such affidavits.

In its decision, the Court carefully observed that there is "no requirement in the Federal Constitution that a teacher's classroom conduct be the sole basis for determining his fitness. ... (citing Beilan vs. Board of Public Education School District of Philadelphia).[30] Nonetheless, to compel a teacher to "disclose his every associational tie is to impair that teacher's right to free association, a right closely allied to freedom of speech and a right which, like free speech, lies at the foundation for a free society."[31] Justice Stewart, for the majority, also wrote that:

> "(T)he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. ... Such unwarranted inhibition upon the free spirit of teachers . . . has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate; it makes for caution and timidity in their associations by potential teachers."[32]

If Sweezy vs. New Hampshire was a landmark First Amendment case for the 1950's, then the Supreme Court's most significant pronouncements on academic freedom in the 1960's came in its decisions in Daggett vs. Bullitt[33] and Keyishian vs. Board of Regents of the University of the State of New York.[34]

Daggett was a class action, brought by members of the faculty, staff and students at the University of Washington, challenging the constitutionality of state statutes which required teachers in public institutions to execute a loyalty oath as a condition of their employment. Particularly objectionable was a 1955 law which purported to bar a "subversive person" from state employment. A "subversive person," under the law:

> "(M)eans any person who ... advocates, abets, advises or teachers by any means any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, ... the government of the United States, or the State of Washington, ... by revolution, force, or violence; or who with knowledge that the organization is an organization as described in the subsections ... hereof, becomes or remains a member of a subversive organization ...."

The same law also declared that the Communist Party was a subversive organization and that membership therein was a subversive activity.

The President of the University, acting at the direction of the Regents, required all employees to take an oath indicating that they had read the provisions of these laws and were not "subversive person(s) as therein defined."

The Court found these statutes unconstitutionally vague. In so doing, it noted that the following reasonable questions could not be answered by the statute: "Does the statute reach an endorsement or support for Communist candidates for office? Does it reach a lawyer who represents the Communist Party or its members or a journalist who defends the constitutional rights of the Communist Party or its members or anyone who supports any cause which is likewise supported by the Communists or Communist Party?"[35]

Thus it was made manifestly clear by at least 1967 that academic freedom was a concept embodied somewhere and somehow within the First Amendment to the United States Constitution.[38a] The Constitution, albeit implicitly -- and the public policy it embodied -- protected academics from unwarranted intrusion into their associations or opinions -- a protection necessitated by the Nation's interest in the free and robust exchange of ideas in the classroom, the laboratory, the library.

The line was not then, and is not yet, drawn as to where individual faculty member's right to believe or express opinions butts against and moves beyond the limits of Constitutional protection -- as, for example, when the expression of opinion becomes advocacy to action, or when the opinion or issue discussed is unrelated to or digressive from the academic subject the state or an institution might properly require be addressed.[38b]

For example, the Court noted in Barenblatt vs. U.S.,[39] a case involving the refusal of an academic to respond to

inquiries by a congressional committee about alleged Communist party activities at educational institutions:

> "Of course, broadly viewed, inquiries cannot be made into the teaching that is pursued in any of our educational institutions. When academic teaching-freedom and its corollary learning-freedom, so essential to the well-being of the Nation, are claimed, this Court will always be on the alert against intrusion by Congress into this constitutionally-protected domain. But this does not mean that the Congress is precluded from interrogating a witness merely because he is a teacher. An educational institution is not a constitutional sanctuary from inquiry into matters that may otherwise be within the constitutional legislative domain merely for the reason that inquiry is made of someone within its walls." (emphasis added) [40]

Another line yet to be drawn is where speech or conduct, otherwise constitutionally protected, so impairs the effective work of the institution that the interests of the institution may prevail over those of the individual. Such an issue was presented in the public school context in Pickering vs. Board of Education.[41] There, a teacher published a letter in a newspaper criticizing the Board of Education and the superintendent. The Board determined the statements were false and concluded that the publication of the letter was "detrimental to the efficient operation of the administration of the schools and that "the interests of the school required" the dismissal of the teacher.

The Court, citing Keyishian, noted that "(T)he problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, and commenting upon matters of public concern, and the interests of the state, as an employer, and promoting the efficiency of the public services it performs to its employees."[42] The critical finding was that "the statements in question were in no way directed toward any person with whom the teacher could normally be in contact in the course of his daily work as a teacher, and therefore, no question of maintaining that the discipline by immediate superiors or harmony among co-workers (was) presented here."[43]

The Court then decided that:

> "In sum, we hold that, in a case such as this, absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment."[44]

On the other hand, and more recently, the Court determined that when a public employee (in this case, an assistant district attorney) circulated an inter-office questionnaire purporting to assess the level of confidence of the staff in a supervisor, the

Likewise, the Court noted that the Washington Supreme Court had indicated that "knowledge" was to be read into every provision:

> "But what," the Court asked, "is it that the Washington professor must 'know'? Must he know that his aid or teaching will be used by another and that the person aided has the requisite guilty intent or is it sufficient that he know that his aid or teaching would or might be useful to others in the commission of acts intended to overthrow the government? Is it subversive activity, for example, to attend and participate in international conventions of mathematicians and exchange views with scholars from Communist countries? What about the editor of a scholarly journal who analyses and criticizes the manuscripts of Communist scholars submitted for publication? Is selecting outstanding scholars from Communist countries as visiting professors in advising, teaching, or consulting with them at the University of Washington a subversive activity if such scholars are known to be Communists, or regardless of their affiliation, regularly teach students who are members of the Communist party, which by statutory definition is subversive and dedicated to the overthrow of the government?
> 36

This questioning -- and the reasoning it represented -- suggested a genuine sensitivity to the work of the scholar and his or her plight under such a vague statute.

In Keyishian, faculty members of the State University of New York claimed that New York's teacher loyalty laws and regulations were unconstitutional. The university trustees, under the statutes, had adopted requirements that faculty verify they were not communists and had they ever been communists would so advise the university president.

The Court, in a decision delivered by Mr. Justice Brennan, struck down the statutes as overbroad and vague, inasmuch as no teacher could really understand what constituted "seditious" utterances and acts under the terms of the law.

But, more important, the Court once again noted that:

> "(O)ur nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. .... The classroom is peculiarly a 'marketplace of ideas.' The nation's future depends upon leaders trained through wide exposure to the robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection" (emphasis added).[37]

And again, in Whitehill vs. Elkins, President, University of Maryland, the Courts struck down, on grounds of vagueness, a loyalty imposed upon employees of the University of Maryland. That oath required applicants for employment to certify that they were not "engaged in one way or another in the attempt to overthrow the government ... by force or violence. Citing Sweezy vs. New Hampshire, the Court found that the continuing surveillance this type of oath places on teachers is hostile to academic freedom."[38]

interests of the state as an employer outweighed the employee's interest in freedom to speak.[45] In this 5 - 4 decision, the Court, per Mr. Justice White, held that:

> "(W)hen a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior. ... Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government; this does not require a grant of immunity for employee grievances not afforded by the First Amendment to those who do not work for the state."[46]

Clearly the distinction between a "mere" employment grievance and more altruistic commentary about institutional policy is not an easy one to delineate. We do know, however, that any individual claiming that his or her employment was terminated improperly because of the exercise of a constitutionally protected right will have to carry the burden of proving such an impermissible motivation by the employer.[47]

Lower courts have considered, for example, whether controversial comments within an academic institution were protected speech or improperly disruptive behavior.[48] But these cases have involved hopelessly complex factual disputes. And most

such conflicts may also involve questions of freedom vs. responsibility (or, some might say, civility) that academics will have to resolve -- and can best resolve -- outside the legal arena.

It is also significant, however, that the Court used a controversy from within the higher education community to reassert the truism that while faculty and others may well have a First Amendment right to speak, they are no way guaranteed that others are under any corollary obligation to listen. In Minnesota State Board for Community Colleges vs. Knight,[49] the Court refused to accept the arguments of some independent-minded faculty that a Minnesota statute granting an exclusive right to participation in formal "meet and confer" processes to a certified bargaining agent violated the constitutional rights of the other faculty. The statute in question required public employers to engage in an official exchange of views with professional employees through bargaining representatives. In so holding, Ms. Justice O'Connor noted that:

> "The academic setting of the policy making at issue in this case does not alter this conclusion. To be sure, there is a strong, if not universal or uniform, tradition of faculty participation in school governance, and there are numerous policy arguments for such participation. .... But this Court has never recognized the constitutional right of faculty to participate in policy-making in academic institutions. .... Even assuming that speech rights guaranteed by the First Amendment take on a special meaning in an academic setting, they do not require government to allow teachers employed by them to participate in institutional policy-making. The faculty involvement in academic governance has much to recommend it as a matter of academic policy, but finds no basis in the constitution." (emphasis added)
> [50]

Worthy of note is the fact that three Justices dissented from the decision of the Court -- Mr. Justice Marshall noting that "(I)n an appropriate case, I would be prepared to include within this collection of constitutionally-protected avenues of communication a measure of freedom on the part of faculty members as well as students to present to college administrators their ideas on matters of importance ... the academic community."[51]

B. The Rights of Students

As the status of students evolved from their historic condition as wards of academic institutions, so too there came a growing recognition of their constitutional rights within those institutions.

But this recognition did not come early. In Hamilton vs. Regents of the University of California,[52] for example, the Court found no impermissible deprivation of "liberty" under the 14th Amendment when the University refused a male citizen the privilege of attending except upon the condition that he take military training. The individual in question, a conscientious objector, had petitioned the University for exemption from military training, and this request was denied.

The Court found, in that 1934 decision, that the student's right to "liberty," as protected by the due process clause of the 14th Amendment, was not impinged upon by the policy. In so holding, the Court stated:

> "The fact that they (the students) are able to pay their way in this university but not any other institution in California is without significance upon any constitutional or other question here involved. California had not drafted or called them to attend the University. They are seeking education offered by the State and at the same time insisting that they be excluded from the prescribed course solely upon grounds that their religious beliefs as conscientious objectors to war, preparation for war and military education. Taken on the basis of facts alleged in the petition, appellants' contentions amount to no more than an assertion that the due process clause of the Fourteenth Amendment as a safeguard of 'liberty' confers the rights to be students in the state university free from obligations to take military training as one of the conditions of attendance. Viewed in the light of our decisions that proposition must be put aside as untenable."[53]

If, as Mr. Dooley observed, "No matter, whether the' constitution follows th' flag or not Th' supreme court follows th' iliction returns,"[54] the Court no doubt properly read the public mood in 1934. There was doubtless little public sentiment for the proposition that those unwilling to bear arms had a constitutionally-protected "liberty" interest in attending a state university.[55]

In other early precedent, the Court had also upheld a Mississippi statute prohibiting students at state colleges or universities from membership in Greek letter societies. The Court found no 14th Amendment violation there, in that a state could reasonably determine that such a rule would keep students safe from being "distractious" from that singleness of purpose which the State desired to exist in its public educational institutions."[56]

The most significant modern precedent in this regard was in the landmark decision of Tinker vs. Des Moines Independent Community School District.[57] In holding that a public school pupil could not be flatly barred from symbolic political

expression, the Court stressed that the First Amendment did not stop "at the schoolhouse gate."

With that principle very much in mind, the Court was confronted in 1972 with the case of Healy vs. James.[58] There, a group of students at a state-supported college were denied "recognition" as a campus organization. Such "recognition" would have entitled them to the use of campus facilities, campus bulletin boards, etc. The students in question represented a local chapter of the "Students for a Democratic Society," at the time considered a radical group. The college president denied this "recognition" because he was not satisfied that the group was independent from the national "Students for a Democratic Society," which, he concluded, espoused a philosophy of disruption and violence.[58a]

In holding that the College might properly deny such "recognition" to a group which refused agreement to comply with reasonable campus regulations,[59] the Court nonetheless concluded that some mere assumed relationship with another organization was not a proper basis for withholding the benefits of

recognition. The Court also noted that while the setting -- in 1969-1970 -- was in a "climate of unrest on many college campuses in this country"[60] the "precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large."[61]

In a pointed concurring opinion, Mr. Justice Douglas, himself also a former university faculty member, used the occasion to take a swipe at faculty everywhere. While railing at those in faculty circles who "have narrow specialties that are hardly relevant to modern times," or who "represent those who withered under the pressures of McCarthyism and other forces of conformity and represent but a timid replica of those who once brought distinction to the idea of academic freedom," he offered the view that "without ferment of one kind or another, a college or university (like a federal agency or other human institution) becomes a useless appendage to a society which traditionally has reflected the spirit of rebellion."[62]

Soon thereafter, in 1973, the Court considered whether a student could be expelled from a public university for the distribution of a campus publication allegedly containing "indecent speech."[63] A graduate student at the University of Missouri had been expelled for distributing a publication containing a political cartoon in which policemen were depicted raping a Statue of Liberty and the Goddess of Justice. The caption under the cartoon read "With Liberty and Justice for all." The same issue also contained an article entitled "M_____ F_____ Acquitted," in which the words represented by "M-F" were explicitly spelled out.

The University's "General Standards of Student Conduct" required students to "observe generally accepted standards of conduct," and specifically prohibited "indecent conduct or speech." In ruling that the explusion was impermissible, the Court cited Healy vs. James, noting that case made it "clear that the mere dissemination of ideas -- no matter how offensive to good taste -- could not be shut off at a state university campus in the name alone of 'conventions of decency'."[64]

It should be noted, however, that Chief Justice Burger, Mr. Justice Rehnquist and Mr. Justice Blackmun all dissented from this decision on the grounds that universities needed sufficient power to govern the environment for which they are responsible.

More recently, in Widmar vs. Vincent,[65] the Supreme Court was called upon to consider whether a state university could -- or must -- prohibit the exercise of religious freedom on campus.

Under the presumed requirements of the First Amendment's proscriptions against "the establishment" of a religion, the University of Missouri at Kansas City had refused to grant the use of its facilities to a "registered student organization" for purposes of conducting religious worship or religious teaching. The students claimed denial of First and Fourteenth Amendment rights, inasmuch as the University had permitted other "registered student organizations" to use facilities for other purposes.

The Court found that once the institution had established a forum for student use, it could not thereafter regulate the content of any group's speech. That is to say, an "equal access" policy for the use of the university facilities not only was

permissible under the establishment clause of the First Amendment, but also required that the institution avoid discriminating because of the content expression.[65a]

The Court was, however, also careful to note the following:

> "Nor do we question the right of the University to make academic judgments as to how best allocate scarce resources or 'to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught and who may be admitted to study'." (citing Sweezy vs. New Hampshire, 354 U.S. 234, 263--1957) .... "The basis for our decision is narrow. Having created a forum generally open to student groups, the University seeks to enforce a content-based exclusion of religious speech. Its exclusionary policy violates the fundamental principle that a state regulation of speech should be content-neutral, and that the University is unable to justify this violation under applicable constitutional standards."[66]

If, then, the Constitution does not "stop at the school-house gates," it is clear that the authority of a college or university over its students has limits. Questions, of course, remain. These are a few: When does the protected First Amendment speech or conduct outweigh the reasonable right of the institution to maintain order and to protect normal academic and administrative processes? When should the responsibility of the institution to control those funds it collects and administers override the right of students and student organizations to use those same resources to promote their own First Amendment rights?

From all this, however, constitutionally-based authority for the rights of the students as individuals to be free from a "governmental" regulation of their First Amendment activities has emerged. Any public institution's authority to discipline, to regulate, to control conduct is and must be tempered by these principles.

C. The Rights of Academic Institutions

The Dartmouth College case was followed in 1844 by the Court's decision in Vidal vs. Girard's Ex'rs.[67] There, the Court was again faced with questions relating to the rights and interests of a private "college." Mr. Girard had bequeathed substantial sums to the City of Philadelphia to establish a "college" for "poor, white, male orphans between the ages of 6 and 10." In so doing, Girard specifically provided that no clergy should be permitted to teach or even visit the institution.

Girard's heirs -- represented, ironically by Daniel Webster -- sought to void this bequest on the grounds that the "college" could not be a charitable institution, given its antipathetic

approach to charitable (religious) values. The Court disagreed, ignoring the arguments of Webster and holding that the will of the donor should be honored.

Here again, the Court found compelling the proposition that private, charitable institutions dedicated to education were of such social importance that they warranted extraordinary protection -- even if those institutions openly espoused some values that did not comport with more popular religious or political thought.

Decades later, in 1904, the Court was less inclined to protect an academic institution from unpleasant popular opinion. Kentucky had passed a statute forbidding the instruction of blacks and whites in the same educational institution. Berea College -- founded in 1869 by an ardent abolitionist group -- was convicted under that law. The Kentucky courts sustained the conviction on the grounds that the State had an interest in discouraging inter-marriage and preventing racial disharmony.

The Supreme Court affirmed,[68] over a vigorous dissent by Justice Harlan,[69] finding that the College could still instruct

both races as long as the classes were not mingled. In an apparent departure from its reasoning in the Dartmouth College and Girard cases, the Court ignored the institution's founding purposes and long history.[69a]

The departure represented by the Berea College case is a useful reminder that man-made institutions -- such as the Supreme Court -- can never be fully insulated from the social and political forces around them. The protection afforded Supreme Court Justices -- lifetime tenure -- by the framers of the constitution has permitted the Court to move out of step with popular opinion for a time -- as, perhaps, in the case of the Warren Court during the 1950's and 1960's -- but rarely for long.

The decision in Berea College reflected, no doubt, popular opinion on the matter of racial integration at its time. The Court's more general and longstanding history of protecting the integrity of academic institutions may well reflect more long-standing -- if not fully understood -- social values.

In contrast with the Berea College case, is the Court's recent decision in the controversial Bob Jones University case.[69b]

There the petitioner institution sought tax-exempt status under the Internal Revenue Code. The Internal Revenue Service had concluded that it could no longer justify allowing tax-exempt status to private institutions that practiced racial discrimination.

Bob Jones University, while permitting unmarried Negroes to enroll as students, refused enrollment to persons who were partners in interracial marriages or were known to advocate interracial marriage or dating. Because of this policy, the IRS revoked the University's tax-exempt status.

The sponsors of Bob Jones Universtiy were found to sincerely believe that the "Bible forbids interracial marriage and dating." Nonetheless, in denying the tax-exempt status to the University, the Court cited its long-standing line of cases establishing beyond any doubt that "racial discrimination in education violates a most fundamental national public policy, as well as the rights of individuals." And, the Court concluded: "(R)acially discriminatory education systems cannot be viewed as conferring a public benefit within the charitable concept under the Internal Revenue Code."[69c]

While generally the Bill of Rights and the 14th Amendment are applicable only to individuals, there nonetheless has evolved a constitutionally-based protection for academic institutions themselves. This has been evidenced, historically, by the Supreme Court decisions in the Dartmouth College and Girard cases. It is found more recently in a variety of other cases, beginning with Sweezy vs. New Hampshire.[70] There, Mr. Justice Frankfurter referred to the "right of the University" -- even a public university -- to make certain judgments. No further explanation is made as to the constitutional basis for this institutional "right" -- and we are left only to conclude that it arises from a liberal reading of the First and Fourteenth Amendments.

The institution's authority and freedom to determine "who may be admitted to study," articulated by Mr. Justice Frankfurter in Sweezy vs. New Hampshire[71] as a vital component of the institution's constitutional protection, came squarely before the Court in the landmark case of Bakke vs. Regents of the University of California.[72] At issue was academic freedom in the context of an institution's right to self-governance, rather

than the more traditional sense of the individual's personal liberties in teaching, speaking and scholarship.

In Bakke, the Supreme Court was called upon to consider the University of California's special admissions program for the Medical School at Davis. Under Fourteenth Amendment analysis, the Court was forced to conclude (for reasons discussed later) that the University of California's preferential admissions program for minority students could not withstand constitutional scrutiny. Because the program involved the classification of persons based on race -- classifications "suspect" under the Fourteenth Amendment -- its justification would require a "compelling" state interest. While the University's policies failed the applicable Fourteenth Amendment test, the Court did find that the right of an institution to attain a diverse student body was a constitutionally permissible goal, one that rose to the dignity of a "compelling" state interest.

And Mr. Justice Powell (for a fractured majority), noted that "academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern

of the First Amendment." Further, "the freedom of a university to make its own judgments as to education includes the selection of its student body."[73]

Citing Sweezy vs. New Hampshire and Keyishian vs. Board of Regents,[74] Justice Powell's opinion noted that "the atmosphere of 'speculation, experiment and creation' -- is so essential to the quality of higher education -- it is widely believed to be promoted by a diverse student body." But the freedom to select a student body, even pursuant to constitutionally legitimate state objectives, is not absolute. The Court also found that "although a university must have wide discretion in making the sensitive judgments as to who should be admitted, constitutional limitations protecting individual rights may not be disregarded."[75]

The constitutional principle that even public educational institutions are to be protected from governmental intrusion in making certain educational decisions is thus well-written, if only tenuously grounded in a constitutional foundation.

Others have expounded in greater detail upon this notion of institutional academic freedom.[76] What remains, however, is the

question of how a public institution -- the creation of a state -- can be said to enjoy constitutionally-based autonomy from the state itself? The Court's writing in this regard seems to ground the institution's constitutional rights in the collective rights of the individual academics therein.[76a]

In any event, here again, questions as to the limits of this institutional autonomy are ripe for controversy and litigation. How far may government go, for example, in prescribing the courses of study -- whether degree programs or specific courses or course content itself -- at public institutions of higher education?[76b] How far may government go in limiting what a public institution may teach -- whether for fiscal reasons or the avoidance of "duplication" within a system or whatever? How far may government go in directing or coercing admissions or academic policies?

Another interesting test concerning the academic freedom of a private institution in higher education may well come before the Supreme Court in an action brought by an organization of homosexual students against Georgetown University. The student organization alleged that the University's refusal to grant them

"official recognition" for purposes of the use of University facilities and access to student organization funding violates the District of Columbia's Human Rights Act, a 1977 law that affords homosexuals the same broad protection it gives to women and members of racial, ethnic and religious minorities. The University, however, has asserted that any such official recognition may well be confused with an endorsement of positions taken by these organizations -- this, running directly counter to the position of the Roman Catholic Church on homosexuality.[76c]

The issue, then, is whether a local law can require that a private institution of higher education take a position it believes to conflict with its fundamental purposes and principles -- a test of the First Amendment's "free exercise" of religion clause as well as the constitutional doctrine of Academic Freedom.

Recent evidence of the Court's reluctance to sanction governmental intrusion into colleges and universities was found again in Grove City College vs. Bell.[77] There, the Court gave a narrow reading to section 901(a) of Title IX of the 1972 Education Amendments, which prohibited sex discrimination in "any

program or activity receiving federal financial assistance." While the federal government had attempted to regulate any and all activities within any institution receiving direct or indirect federal support -- the Court nonetheless found the regulatory authority only "program specific."

The only federal aid received by Grove City College was indirect financial support provided its students; thus the federal government would be permitted to regulate only the financial aid program of that institution. The government could not regulate employment, activities, or other aspects of Grove City College's programs that did not directly receive federal funding -- as, for example, its athletic program, its housing or counseling or other support programs.

The Court did refuse, however, to accept the College's argument that conditioning federal assistance on compliance with Title IX infringed upon the First Amendment rights of the College and its students. As Mr. Justice White wrote: "Congress is free to attach reasonable and unambigucus conditions to federal

financial assistance that educational institutions are not obligated to accept."[78]

The Court was not similarily reluctant to defer to an organization of higher education institutions on the marketing of broadcast rights for athletic events. In National Collegiate Athletic Association vs. Regents of the University of Oklahoma,[79] the Court found the NCAA's control of such broadcast rights to constitute horizontal price-fixing and output limitation -- both violations of the Sherman anti-trust law. Arguments that the unique nature of intercollegiate football warranted special exception from accepted anti-trust analysis -- to help preserve competition balance or to protect live gate attendance at all college games -- were unpersuasive. Only Mr. Justice White, himself a former All-American collegiate football player, joined by Justice Rehnquist, objected to the Court's analysis of college football as a primarily commercial venture.

D. Conclusions

Some have asserted that the role of the Constitution in protecting academic freedom has come into some neglect of late.

And it may well be true that in 1984 contracts, institutional policies, and campus custom may offer faculty and students greater protection than constitutional doctrines.[80] But it was not always thus. Our history is replete with instances in which academics ran afoul of the interests of ecclesiastical bodies of powerful benefactors or politicians, without benefit of any effective protection.[80a]

It is also likely true, as O'Neil points out, that under the constitutional doctrine of academic freedom "university professors will enjoy at least as much extramural freedom as do other government employees, but not necessarily more. .... The constitutional decisions striking down loyalty oaths, intrusive reporting requirements, inhibitions on political activity and other constraints have involved professors as plaintiffs for reasons more incidental than central."[80b] Moreover, "We use terms like 'academi. freedom' with a degree of confidence that may surpass our common understanding."[80c]

The language of the Supreme Court in cases involving academics -- giving constitutional significance to the term

"academic freedom" -- is, perhaps, of more rhetorical than legal value. Still, the Court has expressed as well as demonstrated a peculiar deference to academics and academic institutions. It protected Dartmouth College, as a special kind of institution, from governmental intrusion; it drew limits on the power of inquiry by legislative bodies intruding into educational affairs and issues; the Court did note that an institution's interest in a diverse student body -- selected by that institution -- was "compelling;" the Court did protect the right of a student editor to publish controversial material -- elevating the status of her rights to those of a private publisher; the Court did protect student organizations in a public institution from constraints upon their associational and expressive rights. And could it not be that at least some of the policies and contractual provisions enjoyed by academics and students today arose as a direct or indirect consequence of these legal mandates?

Moreover, as O'Neil pointed out, today it is not always clear "whose academic freedom is at stake." The typical academic freedom in the 1970's and 80's tends to be an intramural dispute

-- between administration and faculty, between administration and students, between faculty and their departments or personnel committees, between unionized faculty and rugged individualists, between protesters and controversial speakers. These controversies blur moral and ethical issues -- whose freedom is at stake? Whose must be restrained? Overt intrusion by external forces seems less ominous -- the matter of loyalty oaths are settled, the HUAC is dormant, trustees like "Big Ed" from Thurber's "The Male Animal" seem less threatened or more preoccupied with intercollegiate athletics or the university's role in economic development.

But while contemporary policies and contractual agreements may well provide more specific or extensive safeguards -- whether owing to militant unionism or enlightened academic and political leadership -- threats remain, albeit more subtle than those of earlier history. And the constitutional-based protection for free speech and association, expressed by the Court in terms of great deference to the academic community, has likely served as at least an impetus for the development of these

protective policies. It also serves as a "floor" or a "safety net" beneath which institutional or governmental legislation or policies or practice may not fall. That reassurance was not always so clear or so comforting. And it is likely because it is so comforting that it might today be taken for granted.

II. EQUAL OPPORTUNITY IN THE ACADEMY

> "(N)or shall any State ... deny any person within its jurisdiction the equal protection of the laws." Amendment 14, U.S. Constitution.

While the history of the nation and the Supreme Court relative to the issue of equal opportunity is not a source of pride, the modern history of the Court is more noble. Likewise, the earlier history of American higher education is not particularly noble with respect to equal opportunity.[81]

As late as 1938, the Supreme Court was required to strike down as unconstitutional a Missouri scheme which barred Negroes from a legal education in that state by offering instead tuition to attend schools in other states. The Court held, by 7-2 vote, that the individual's right to "equal protection of the law" must be provided within a state's own borders.[82]

Ten years after this decision, the Court was again faced with a segregation case arising from the higher education community -- this time, ruling that Oklahoma could not admit any additional white students to a state-supported law school unless it first provided access to legal education for a black woman.[83]

And then, two years later, Oklahoma was again called to task before the Court -- this time because, while University officials had been forced by a lower court to admit a black man (who had a graduate degree and other appropriate credentials) to a graduate program in education, the trappings of segregation were still imposed with a vengeance. This student was, for example, required to sit in a special row in the classroom or at a special table in the library. The Court unanimously held that even "intangible" factors must be considered, and that Oklahoma's actions in this regard clearly deprived the student of such equality of treatment.[84]

And again prior to the landmark public schools' decision in Brown vs. the Board of Education,[85] the Supreme Court was faced with the question of whether the so-called "separate but equal"

test -- then presumed acceptable under the 14th Amendment -- was met in a higher education context. In Sweatt vs. Painter,[86] decided the same day as McLaurin, the Supreme Court faced the question of whether a Negro, who had been denied admission to the University of Texas Law School solely because of his race, was afforded the "equal protection of the law" under the 14th Amendment when he was granted enrollment at a separate law school, newly established by the State for Negroes.

The University of Texas Law School was staffed by a faculty of 16 full-time and 3 part-time professors, some of whom were nationally recognized in their field; it had a library of 65,000 volumes and approximately 850 students; students had opportunities to participate in a law review; moot court facilities, scholarship funds, and national honorary society recognition were available to them. By contrast, the law school for Negroes, opened just a few years before, had no regular faculty or library; it was not accredited.

The Supreme Court was thus faced with whether the State of Texas provided persons, individually, with the "equal protection

of the laws." Texas had clearly failed the test, and the Court held that "the equal protection clause of the Fourteenth Amendment requires that (the student) be permitted to enter the University of Texas Law School."[87]

Brown vs. the Board of Education, subsequently laid to rest the judicial doctrine of "separate but equal" educational opportunities under the Fourteenth Amendment. That constitutional issue having been determined, the Supreme Court did not face the equal opportunity question in the higher education context until 1978, when it could no longer avoid the highly controversial public policy questions raised by so-called "affirmative action" admissions and hiring practices.

Earlier, the Supreme Court had declined to reach a decision on the merits of DeFunis vs. Odegaard.[88] In that case, a white applicant to the University of Washington Law School had been denied admission in favor of candidates admitted under a special program for racial minorities. Asserting that his qualifications were superior to several admitted applicants, DeFunis persuaded the courts of the State of Washington to order temporarily his

admission to the University of Washington Law School. By the time the case reached the Supreme Court, DeFunis had all but completed his degree program. The Supreme Court, over the vigorous dissent of Mr. Justice Douglas, declined to hear the case on the grounds that the controversy was then moot.

The issue could not, however, be avoided in Bakke vs. the Regents of the University of California.[89] Bakke had been denied admission to the University of California at Davis Medical College while, at the same time, a number of positions (16 out of 100) in the entering class had been set aside for a special admissions program for minority applicants. Bakke had not been permitted to compete on an equal basis for those particular "places" in that entering class because he was Caucasian.

The Court broke into three factions on the issues presented. Four Justices concluded that the constitutional question of whether Bakke was denied the equal protection of the laws need not be reached, because the program first violated a federal statute -- the Civil Rights Act of 1964. Section 601 of that Act provides: "No person of the United States shall, on the ground of race,

color, or national origin, be excluded from participation in ... any program or activity receiving federal financial assistance."

Four other Justices found no legal infirmity in the University's program. They concluded that: "Government may take race into account when it acts not to demean or insult any racial group but to remedy disadvantages cast on minorities by past racial prejudice .... Claims that law must be 'color-blind' or that datum or race is no longer relevant to public policy must be seen as aspiration rather than description of reality."

Mr. Justice Powell, standing alone, wrote the opinion of the Court, holding that racial classifications which violate the 1969 Civil Rights Act are the same as those which violate the Fourteenth Amendment. While rejecting the position that "racial discrimination against members of the white majority cannot be suspect if its purpose can be characterized as benign," he found that "the attainment of a diverse student body ... is clearly a constitutionally permissible goal for an institution of higher education."

Powell rejected, however, the arguments that California also had a "compelling interest" in assuring a specified percent of any racial or ethnic group in the student body, or in eliminating the effects of past societal discrimination (when this is at the expense of others and when there has been no judicial or administrative finding of specific discrimination), or training professionals to better serve a wider minority population (particularly when there was no showing that this admissions program would accomplish that goal).

The question then came to reconciling Bakke's Fourteenth Amendment rights with the University's interest in promoting a diverse student body. Powell concluded that while race may be a factor in admissions decisions, the program at the University of California went too far by utilizing race as the only factor in determining who would compete for 16 places in its entering class. In short, while "the interest of diversity is compelling in the context of the University's admissions program," the specific program at California was not necessary to achieve a legitimate institutional goal.

Powell cited a Harvard College policy which, in his opinion, accomplished that end in a constitutionally permissible faction. The Harvard policy in question "expanded the concept of diversity to include students from disadvantaged economic, racial and ethnic groups." Thus, race was a factor in admissions decisions, rather than the sole factor in any particular decision. While under the Harvard policy the race of an applicant "may tip the balance in his favor, just as geographic origin or a life spent on a farm may tip the balance in other candidates' cases,"[90] race nonetheless was not the sole determinant in these decisions.

To this approval of the Harvard program, Justice Blackmun acidly observed that: "I am not convinced, ... that the difference between the Davis program and the one employed by Harvard is very profound or constitutionally significant.... The cynical, of course, may say that under a program such as Harvard's one may accomplish covertly what Davis conceives it does openly."[91]

Thus race continues to be a "suspect classification" under the Fourteerth Amendment -- whether used to benefit or

discriminate against a race of persons -- and to justify its use a "compelling" state interest must be established. At least one Justice on the Supreme Court believes that diversity in a student body is such a compelling interest -- though any program or policy which is designed to achieve that goal must be narrowly drawn toward that end, and must do minimum violence to the rights of persons who may be thus disadvantaged.

The plurality opinion in Bakke thus left institutions of higher education with substantial discretion over admissions policies -- albeit with a clear warning that there were limitations on that discretion when individual constitutional rights butted against institutional objectives, however salutary those might be.

In reviewing various statutory programs in the area of equal opportunity, the Court has been solicitous of a university's interest in control over educational matters. For example, in Southeastern Community College vs. Davis,[92] the Court refused to require, under Section 504 of the Rehabilitation Act of 1973, that an institution of higher education substantially modify an

educational program to accommodate the handicap of an applicant for admission. The college in question had denied admission to a nursing program to an applicant with a serious hearing disability. The institution determined that a hearing limitation would interfere with patient care.

The statute read that "no otherwise qualified handicapped individual ... shall, solely by reason of his handicap, be excluded from participation in ... any program or activity receiving federal financial assistance ...." And while the Court noted that this does require an "even-handed treatment of qualified handicapped persons," it nonetheless held that the reluctance of the institution to "make major adjustments in its nursing program does not constitute such discrimination."

On the other hand, in Cannon vs. the University of Chicago,[93] the Court concluded that a rejected female applicant to a medical school who alleged sex discrimination had a right, under Title IX of the Education Amendments of 1972, to bring a private suit against the institution -- rejecting the contention that such litigation would pose risk that "university administrators will

be so concerned about the risk of litigation that they will fail to discharge their important responsibilities in an independent and professional manner."

Likewise, institutional policies will not be protected if they interfere with the proper exercise of federal policy over matters not directly related to educational questions. For example, in Toll vs. Moreno,[94] the Court held that the University of Maryland could not deny aliens the benefit of resident tuition merely because of their immigration status. When the Congress had made explicit decisions as to the status of non-immigrant aliens in this country, the State of Maryland -- through its university -- was not permitted to render them ineligible for the benefits of domicile status.[95]

As the Bakke case was a landmark in the area of racial affirmative action, the case of Mississippi University for Women vs. Hogan will likely become a landmark for the analysis of sex discrimination.[96]

In 1884, the Mississippi Legislature had created the "Mississippi Industrial Institute and College for the Education

of White Girls in the State of Mississippi," subsequently named the Mississippi University for Women. Even in the 1980's, the University had limited enrollment in its School of Nursing to females. Mr. Hogan, a registered nurse who was seeking a baccalaureate degree in nursing, was denied admission solely on account of his sex. While the State of Mississippi did provide Mr. Hogan with other educational opportunities -- specifically, by traveling some distance to another institution -- there was no question but that females had an opportunity which was not available to Hogan.

While the Supreme Court had never, theretofore, held that sex was a "suspect classification" under the Fourteenth Amendment, thus requiring a "compelling state interest" to withstand constitutional attack, the Court had struggled with the standard to be applied in determining whether sex-based classifications by states were permissible.[97] These decisions had established that such classifications required an "exceedingly persuasive justification" -- a standard somewhere short of the "compelling state interest" applicable in racial discrimination cases.[98] In such sex discrimination cases, an "important governmental objective

must be established in order to withstand constitutional attack, and the "discriminatory means employed ... must be substantially related to the achievement of those objectives."[99]

In Hogan, the Court concluded that Mississippi's articulated justification for maintaining a single-sex admissions policy at this School of Nursing -- to compensate for other discrimination against women -- was "unpersuasive."[100] Mississippi failed to show that women lacked opportunities to obtain training in the field of nursing, or to obtain positions of leadership in that field.

Justices Burger, Blackmun, Powell and Rehnquist all dissented -- principally in deference to the historical purposes of single-sex educational programs. It should be noted, by the way, that the case's majority opinion was written by Ms. Justice O'Connor,[100a] the first woman appointed to the United States Supreme Court.

Conclusions

And so, in a mere 30 years, higher education has gone from Sipuel to Bakke, from McLaurin to Hogan. The controversies swirl today about the future of predominently or historically black institutions -- desegregation at the state-wide level. The issues are whether to dismantle or reorganize institutions initially established as the only post-secondary opportunity for oppressed minorities -- other institutions have since been opened to minority racial and ethnic groups.[100b]

Today, controversy also swirls around the means by which institutions that have historically been closed or hostile to minorities might now be fully integrated -- the so-called "affirmative action" plans, most of which were adopted at the insistence of federal regulatory agencies.

Finally, today controversy swirls about whether federal government may enforce, by statute, the provisions of Title IX of the Education Amendments -- barring sex discrimination in educational programs. The utility of the equal protection

clause of the 14th Amendment in this regard has come before the Court only at the insistence of a male.

Over the past thirty years the Supreme Court has taught that the notion of "separate but equal" educational opportunities for the race is no longer constitutionally tenable. But the Court has also taught that a state may go too far in rectifying past injustices, and that that same equal protection clause applies in force to protect the interests of white citizens who are disadvantaged by state-sanctioned programs on account of their race. While state law need not, and perhaps cannot, be color blind, the states, or any state institution, must carry a strong burden of proof to show that any classification based on race is justified by a compelling interest.

Thus, while a state may have a compelling interest in diversifying its student body -- an interest also protected under the constitutional doctrine of academic freedom -- even this interest may not be used, alone, to advance the rights of one race of citizens over another.

The Equal Protection Clause of the 14th Amendment holds that even as McLauren and Sipuel could not be so shabbily treated; likewise, the discrimination against Bakke solely on account of his race was an improper and discriminatory effort to rectify past injustice -- however well-intentioned that effort might have been.

Likewise, the Court has little sympathy for state-based discrimination based upon sex -- even well-intentioned, as in the Hogan case. Distinction between the "compelling state interest" needed to justify classifications based on race and the "exceedingly persuasive justification" required in cases of classifications based on sex, seems little more than a fine point today. The constitutional doctrine, evolved over a period of years, makes it clear that state action which seeks to classify persons on the basis of race or sex is suspect -- even if the objectives are well-intentioned and crafted to advance the rights of those classes of persons who had suffered previous wrong.

And so, practices common over some thirty years ago are today unthinkable. The Supreme Court has been credited, in substantial measure, with initiating this great social change -- first,

through its landmark decision in Brown vs. the Board of Education, the progeny of that ruling. Thereafter, progress was gained through federal enforcement of statutory law -- notably the Civil Rights Act of 1964, the Education Amendments of 1972, and Executive Order 11246. Finally, however, it came again to the Court to set limits on the devices used to promote social and legal change -- first to rule on the controversial "affirmative action" policies and the rights of citizens of majority races; and second, to consider the rights of a male applicant to a single-sex educational program.

The check placed on federal enforcement in the Grove City College case is based on statutory construction -- a matter easily changed by the Congress -- rather than constitutional doctrine. But the signal there may also be toward restraint in federal interference in academic institutions.

The word today seems to be "equality" -- for disparate treatment of any character will be carefully scrutinized under the Equal Protection Clause of the 14th Amendment. This doctrine -- limiting affirmative action, limiting state support

for single-sex or historically black institutions or programs -- seems at peace with the times in academe. And while specific controversies and the application of this doctrine may, and doubtless will, continue to arise, the doctrine seems generally settled and provides at least the Constitutional framework for the social changes taking place between the races and the sexes in higher education and elsewhere.

III. PROCEDURAL RIGHTS FOR FACULTY AND STUDENTS

> "(N)or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Constitution, Article XIV(1).

Over just the past two decades, several cases have come before the Supreme Court concerning whether public institutions of higher education had denied individuals the right to "life, liberty or property," and if so, just what "due process" requirements were applicable. Under the Fourteenth Amendment analysis, the actions of public institutions constitute "state action," and if such action affects "life, liberty or property" interests of individuals, procedural protections must be honored.

A. Faculty Rights

In Slochower vs. Board of Higher Education of New York City,[101] the Court considered whether a tenured faculty member at the City University of New York could be summarily dismissed from his employment because he exercised his Fifth Amendment right not to answer certain questions before a legislative committee. Under New York law, a tenured faculty member was entitled to notice and hearing before any discharge. Another New York statute also provided, however, that any City employee who utilized the privilege against self-incrimination before a legislative committee was deemed to have resigned from his employment. In holding the latter statute unconstitutional, the Court found impermissible an implication of guilt based upon the exercise of a constitutional right. The Court also found that Slochower had been denied the "protection of the individual against arbitrary action," which had been identified as the "very essence of (procedural) due process."[102]

Noting that while "the State has broad powers in the selection and discharge of its employees, and it may (have been)

that proper inquiry would have showed Slochower's continued employment to be inconsistent with the real interest of the state," the Court nonetheless found "there has been no such inquiry here, and ... the dismissal of appellant violates due process of law."[103]

The principle restated in Slochower, and the long line of precedent before it, gives rise to those two persistent questions applicable to any due process litigation: Was either "life, liberty or property at issue in any action involving the state? and, if so, what process was due?"

In 1972, in the companion cases of Perry vs. Sinderman[104] and Board of Regents vs. Roth,[105] the Court was called upon to determine the procedural rights of non-tenured faculty. In neither instance -- Professor Sinderman at Odessa Junior College or Professor Roth at the University of Wisconsin/Oshkosh -- was either faculty member provided an explanation of the reasons for his termination or a hearing at which this decision could be challenged.

In Sinderman, the Texas system did not have a tenure policy, and faculty served under a series of one-year written contracts. Professor Sinderman had been thus employed for ten consecutive years.

In Roth, the faculty member in question was not contracturally entitled to a statement of reasons for the non-renewal nor to any procedural protection.

The issue, then, in both cases, was whether the non-renewal of the faculty member's contract somehow constituted, a deprivation of "liberty" or "property" within the meaning of the 14th Amendment.

In Sinderman, the Court found that while a merely subjective "expectancy" of re-employment might not itself be protected, the faculty member was at least entitled to an opportunity to establish in a lower court that the College had a de facto tenure policy. If so, and if the faculty member's interest in continued employment rose above the mere "expectancy" of re-employment, then he or she would have a "property interest" in continued employment and would be entitled to some procedural protection before termination.

While a written contract with explicit tenure provisions need not be present to create such property interests, the Court

noted that proof of such an interest in continued employment would at least "obligate college officials to grant a hearing at his request, where he could be informed of the grounds of his non-retention and challenge their sufficiency."[106]

In Roth, where the Wisconsin statutory law contained specific provisions governing tenure or "permanent" employment, non-tenured faculty had no "property interest" in continued employment. Professor Roth had argued, however, that he had been deprived of "liberty" -- in that the non-renewal of his contract created a stigma or disability in seeking other academic employment.

The Supreme Court had previously defined "liberty" to include the "right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge ... and generally to enjoy those privileges long recognized as essential to the orderly pursuit of happiness by free men."[107] It had also noted that: "(I)n a constitution for free people, there can be no doubt that the meaning of "liberty" must be broad indeed."[108]

In Roth, however, it was clear that the university did not damage his standing and associations within the academic community. The Court found that the mere non-renewal of his contract did not, in itself, call his good name, reputation, honor or integrity into question.[109] The Court observed: "It stretches the concept too far to suggest that the person is deprived of 'liberty' when he simply is not rehired in one job but remains free as before to seek another."[110]

What now appears obvious was, of course, not always so.[110a] Clearly, tenured faculty are entitled to procedural protection prior to any disciplinary action; clearly non-tenured faculty are entitled only to what specific institutional policies provide. Much of this now is established by contract -- either through institutional policies or through collective bargaining. In any event, the basis for these agreements and policies arose from understandings of constitutional rights as articulated in the Slochower, Roth and Perry cases.

B. Student Rights

The Court has likewise been faced with the question of whether and what student interests must be protected by due process. In Vlandis vs. Kline,[111] for example, the question involved students who had been deemed non-residents of a particular state. Connecticut, like other states, requires non-residents to pay higher tuition to attend its public institutions. Its law also provided that once a student was classified a non-resident, an irrebuttable presumption of non-residency for the duration of enrollment was created.

The issue in Kline was not whether the states could classify non-residents for purposes of disparate treatment. That right was well-established under the equal protection clause. Rather, the students in question demanded a right to establish that they had in fact become residents of the State. And the Court held that they were entitled to such a right.

The classification in question, and the irrebuttable presumption it created, were "so arbitrary as to constitute a denial of due process of law,"[112] stated the majority opinion.

The State had other, reasonable alternatives for determining bona fide residence -- and these could not be ignored merely because their applications were burdensome.

While the Kline case dealt with the narrow issues of an irrebuttable presumption and a clear "property" interest in a financial benefit, it is also clear that other student interests enjoy constitutional protection as well.

Earlier, lower court decisions had made it clear that students attending public institutions of higher education had a "property interest" in continued attendance, and that certain procedural rights attached to that property interest during disciplinary actions."[113] In Board of Curators of the University of Missouri vs. Horowitz,[114] the Court considered whether a student dismissed from the University of Missouri Medical School for academic reasons was entitled to procedural protections. There, each student's clinical performance was assessed by a Council of Evaluation -- a faculty/student body which in turn recommended actions to the faculty and dean. A faculty member had expressed dissatisfaction with the performance

of Ms. Horowitz, and this council recommended that she be placed in a probationary status. Later, this council again evaluated her academic progress and concluded that she should not be considered for graduation. The dean and the university provost accepted that recommendation.

The Court held that the procedure in question, whereby the student was advised of faculty dissatisfaction and given an opportunity to improve, fully met 14th Amendment standards -- if any such protections were required at all. Ms. Horowitz had alleged that the dismissal deprived her of "liberty," by impairing her opportunity to continue in her medical education or employment in the medically-related field.[115] But the Court found no need to determine whether any liberty or property interest was at stake, inasmuch as any such interest which might have existed was properly protected under the institution's dismissal procedure.

No formal hearing, as might be needed in a disciplinary action, was held to be required for academic dismissal. In so holding, the Court also recognized that:

> "(T)he need for flexibility (under the 14th Amendment) was illustrated by the significant difference between the failure of a student to meet academic standards and the violation by the student of a valid rule of conduct. This difference calls for far less stringent procedural requirements in the case of the academic dismissal."
> [116]

Mr. Justice Rehnquist, for the Court, further wrote:

> "Like the decision of an individual professor as to the proper grade for a student in his course, the determination of whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decision making. Under such circumstances, we decline to ignore the historic judgment of educators and thereby formalize the academic dismissal process by requiring a hearing. The educational process is not by nature adversary; instead it centers around a continuing relationship between faculty and students, one in which the teacher must occupy many roles -- educator, advisor, friend, and, at times, parent substitute."
> [117]

In another, even more telling comment, the Court declined "to further enlarge the judicial presence in the academic community and thereby risk deterioration of many beneficial aspects of the faculty-student relationship," observing, "as did the Massachusetts Supreme Judicial Court over 60 years ago, that a hearing may be 'useless or harmful' in finding out the truth as to scholarship."[118]

Conclusions

And so, it is settled that, under the Constitution, actions by state-supported institutions of higher education are state actions -- subject to the "due process clause" of the 14th Amendment. It is also clear that actions by public institutions which affect individuals may well impinge upon "liberty" or "property" interests, and thus give rise to procedural protections.

Clearly, students have a "property" interest in their continued attendance at public institutions of higher education. Likewise, faculty and other employees have a "property" interest in their contractual employment rights; and they also may have a "liberty" interest in actions which adversely affect their professional standing.

The "process" that is "due" relates to the rights affected. But the 14th Amendment clearly requires that in disciplinary actions -- whether against employees or students -- the individual have a notice of charges, an opportunity to face accusers and offer rebuttable for an objective forum with a truth-seeking function.

While the treatment of those matters of a governmental nature -- that is, related to employment or discipline -- requires strict adherence to certain procedural requirements, the Court was loath to impose such requirements or procedures in academic matters. The distinction between the university as a mere public agency versus a unique academic community was thoughtfully recognized and carefully drawn in the Horowitz case.

Again, what now seems obvious -- that a public college or university is constrained by certain legal (or constitutional) requirements in its treatment of students -- was not always so. In those halcyon days of in loco parentis, deans of students were said to have meted out justice that was swift and firm without regard to procedural niceties. Today, however, those proceedings of a governmental nature -- again generally involving discipline -- require that institutions afford at least rudimentary procedural protection for students.

And even though the Courts have been far less stringent -- indeed, even reluctant -- in applying procedural strictures on academic processes, Court decisions about the 14th Amendment

rights of students have had a significant impact on the ways in which colleges and universities relate to their principal constituency. Indeed, it is very likely that the demise of the in loco parentis theory is in no small way related to the recognition of these constitutional rights.

That these rudimentary requirements seem today to make such good sense and to embody fundamental institutional fairness ought not to obsure the fact that they are requirements of constitutional law -- the protection owed each individual by his or her state -- not merely a matter of institutional grace.

It should also not go unnoticed that most institutional policies with respect to disciplinary actions against students, faculty or other employees, go well beyond the minimal requirements of the 14th Amendment. Indeed, most public institutions have created forums for highly adversarial proceedings never contemplated by nor required by the Courts. In that sense, academe may very well have over-reacted to constitutional doctrine.

But the Court has made it abundantly clear that -- particularly in matters concerning academic judgment -- due process requires only fundamental fairness -- not institutional mimickry of Federal Court procedures. And if some who argue, with passion and force, that public institutions today are procedure-bound and that blame might be attributed to the Supreme Court, this criticism is not well taken.

IV. CONCLUSIONS

Would the redefinition of students' relationships with colleges and universities have occurred but for judicial determinations concerning the Fourteenth Amendment due process clause of First Amendment protections? Perhaps -- but not likely as rapidly or as thoroughly.

Would institutions have redefined the rights and responsibilities of faculty and staff with as much specificity had the Courts not first established constitutional limits and protections in this regard? Perhaps -- but not likely.

Would relationships -- on campus or off -- between the races and the sexes have evolved to their present state had the Supreme Court not, persistently and steadfastly, utilized the Fourteenth Amendment to change society in fundamental ways? Not likely -- or at least not as rapidly or as dramatically.

None of this is to suggest, of course, that there were not other events and other forces that were mightily important in causing or shaping the changes in higher education over the past decades: demographic changes, the consumer protection movement, the mores of successive "generations" or college-age youths, inflation, the Vietnam war, the current preoccupation with vocationalism. These factors and others all changed and shaped the academy. But the application of constitutional doctrines to controversies involving the academy -- legal theories emanating from the Supreme Court -- has also played a tremendously significant role in the redefinition of academic relationships, within and without.

While a great many questions -- generally specific questions -- remain unanswered, we now generally know the constitutional

principles which govern academic institutions. Our understanding of these principles will not make life simpler -- quite the contrary. But the protection thus rendered to individuals -- as well as to institutions -- is likely well worth the price, any price. And if institutions are governed today with greater attention to legalities and less attention to traditions, the academy and its citizens are nonetheless more secure from external forces as well as from one another.

The pervasive influence of the Supreme Court can be seen through most of these changes, and the consequences of that influence have been more wholesome than deleterious. Whether the framers of the Constitution envisaged -- or could have envisaged -- these issues, or had in fact any sensitivity to academic concerns, the Justices of the Supreme Court, through the past 160 plus years, have almost unfailingly given extraordinary deferences and protection to academe and to academics. This constitutional protection, protection not specified in the Constitution but inferred therein only through the wisdom of these Justices, preserves for higher education a uniquely

insulated position -- one not yet fully understood or appreciated by academics, and one that rests uneasily upon the hope that future Justices will share the principles of Justices past.

FOOTNOTES

1) Dixon vs. Alabama State Board of Education, 294 F. ed 150 (5th cir., 1967), cert. den. 368 U.S. 930.

2) Coleman vs. Western Michigan University, 336 N.W. 2d 224 (Mich., 1983).

3) Gladney vs. Thomas, 573 F. Supp. 1232 (N.D. Ala., 1983).

4) American Futures Systems vs. Pennsylvania State University, 568 F. Supp. 666 (M.D. Penn., 1983); and American Futures Systems vs. State University of New York at Cortland, 565 F. Supp. 754 (N.D.N.Y., 1983). But see also Chapman vs. Thomas 743 F. 2d 1056 (4th cir., 1984).

5) Naragon vs. Wharton, 572 F. Supp. 1117 (N.D.N.Y., 1983).

6) Stanley vs. Magrath, 719 F. 2d 279 (7th cir., 1983).

7) Haugland vs. Meier, 335 N.W. 2d 802 (N.D., 1983).

8) Herbert vs. Harte-Hawks Texas Newspapers, 652 S.W. 2d 546 (Tex., 1983).

9) Uzzell vs. Friday, 592 F. Supp. 1502 (M.D. N. Car., 1984).

10) Woodruff vs. Georgia State University, 304 S.E. 2d 697 (Ga., 1983).

11) Wiggins vs. Stone, 570 F. Supp. 1451 (M.D. La., 1983).

12) Milliner vs. Turner, 436 So. 2d. 1300 (La. App., 1983).

13) Mahoney vs. Hawkin, 593 F. Supp. 1171 (S.D.N.Y., 1984).

14) Ewing vs. Regents of the University of Michigan, 742 F. 2d 913 (6th cir., 1984).

15) Swope vs. Lubbers, 560 F. Supp. 1328 (W.D. Mich., 1983).

16) See AAUP's "General Declaration of Principles, 1915"; also AAUP and AAC's 1925 "Conference Statement;" and 1940 AAUP and AAC "Statement on Academic Freedom and Tenure." See also Metzger, "Academic Freedom in America: A Historical Essay," A Report on Recommendations by the Commission on Academic Tenure in Higher Education, Jossey-Bass, 1973.

16a) Controversy certainly persists, however, as to the force and effect of tenure in the context of institutional financial exigency. See e.g. Bolger and Wilmoth, "Dismissal of Tenured Faculty Members For Reasons of Financial Exigency," 65 Marquette L. Rev. 347, (1982). And there will always be controversy as to the specific grounds that warrant dismissal of a tenured person. See Lovain, "Grounds for Dismissing Tenured Postsecondary Faculty for Cause," 10 J. Coll. & Univ. L. 419 (Winter, 1983-84).

16b) For example, The Court was required to consider the unique relationships that exist within the academy in National Labor Relations Board vs. Yeshiva University, 444 U.S. 672 (1980). There, the issue was whether the faculty of that institution was "managerial or supervisory personnel," and thus not "employees" within the meaning of the National Labor Relations Act. As "managerial or supervisory personnel" the faculty would not be entitled to the federally-protected right to recognition of a bargaining agent. "Managerial employees" are defined as those who "formulate and effect management policy by expressing and making operative the decisions of their employer." The Court found that the faculty's authority in academic matters was absolute at Yeshiva -- noting that they decided "what courses would be offered, when they would be scheduled, and to whom they would be taught." 444 U.S. at 682 and 686.

The key implication of the Yeshiva decision for faculty in private institutions is that they must choose between the kind of "managerial" role they enjoy under traditional shared governance and the bargaining power they might seek by unionization. The result -- or the predictable result -- is the slowing of any movement toward faculty collective in the private sector. See generally, Lee, "Faculty Role in Governance and the Management Exclusion: Implications of the Yeshiva Decision," 7 J. Coll. & Univ. L. 222 (1980-81); and Bodner, "Implications of the Yeshiva Decision," 7 Coll. & Univ. L. 78 (1980-81).

17) Grove City College vs. Bell, 104 S.Ct. 1121 (1984).

17a) Minnesota State Board of Community Colleges vs. Knight, 104 S.Ct. 1058 (1984).

17b) Selective Service System vs. Minnesota Public Service Research Group, 104 S.Ct. 3348 (1984).

17c) National Collegiate Athletic Association vs. Regents of The University of Oklahoma, 104 S.Ct. ____ (1984).

18) Likewise, of course, the Court has passed on a myriad of complex and significant cases concerning education at all levels; and the impact of the Court's decisions in this area has been enormous. For an analysis of this broader topic see, e.g., Reuther, The Supreme Court's Impact on Public Education, published by Phi Delta Kappa and the National Organization on Legal Problems of Education, (1982).

18a) In "Private Universities and Public Law," 19 Buffalo Law Review 155 (1970), O'Neil argued that the original distinction between public and private institutions of higher education is traceable to the Dartmouth College case, where there was delineated a distinction between a "civil institution to be employed in the administration of government" and a "private eleemosynary institution," (17 U.S.--4 wheat.--518, 647). O'Neil argues that the distinction between public and private institutions is a specious one, and that private colleges are "like other non-governmental institutions claim to be acting for or in the place of the state." The issue remains as to what is an appropriate gradation of constitutional application given the various governmental functions of "private" institutions.

19) Trustees of Dartmouth College vs. Woodward. 17 U.S. (4 Wheat) 518 (1819).

20) Ibid. at 598.

21) Id. at 567.

22) Id. at 645.

23) For an analysis tracing the roots of a significant theory to this case, see: Campbell, 70 Kentucky L.J. 643, especially at 704-705 (1981-1982). "Simply stated, the Dartmouth College doctrine was that the federal contracts clause protected private religious, quasi-religious and secular corporations from arbitrary state legislative attack. The Court thus partially established for the first time the constitutional principle of associational freedom and integrity in the context of the religiously and politically diverse and highly competitive early 19th-Century American society."

24) 350 U.S. 551 (1956).

25) Ibid. at 558.

26) 354 U.S. 234 (1957).

27) Ibid. at 250.

28) Ibid. at 261-262.

29) 364 U.S. 479 (1960).

30) 357 U.S. 399 at 406 (1958).

31) 364 U.S. at 485-6.

32) Ibid. at 487.

33) 377 U.S. 360 (1964).

34) 385 U.S. 589 (1967).

35) 377 U.S. at 368.

36) Ibid. at 369-70.

37) 385 U.S. at 603.

38) 389 U.S. 54 (1967)

38a) For a review of legal precedent to 1969, see Note, "Developments in the Law: Academic Freedom" -- 1968 Harvard L. Rev. 1045. "The most important proposition about the judicial doctrine of academic freedom is that it currently applies almost exclusively to public education.... A second central proposition is that when issues of academic freedom have been presented, the courts have tended to emphasize procedural regularity rather than review the substantive basis for educational decisions."

The Court has also clearly held that excessive or improperly-motivated state regulation of the content of what is or may be taught is also unconstitutional. In Epperson vs. Arkansas, 393 U.S. 97 (1968), for example, the Court struck down an Arkansas statute which purported to make it unlawful for any teacher in any state-supported school or university to teach or use a textbook which teaches "that mankind ascended or descended from a lower form of being."

39) 360 U.S. 109 (1959).

40) Ibid. at 112. Moreover, the courts have not been willing to find some special privilege -- under the guise of "academic freedom" -- to protect academics from judicial compulsion to disclose evidence concerning peer review proceedings in personnel decisions. See e.g., In re Dinan 661 F. 2d 426 (5th cir., 1981, cert. den. 102 S.Ct. 2904 (1982); and also "Comment," 68 Iowa L. Rev. 585 (Mar., 1983). It has also been noted that the asserted "privilege" to protect the confidentiality of peer review proceedings likewise prevents plaintiffs from proving claims of unlawful discrimination. See Mobilia, "The Academic Freedom Privilege: A Sword or a Shield," 9 Vermont L. Rev. 42 (1984).

41) 391 U.S. 563 (1968).

42) Ibid. at 568.

43) Ibid. at 569-570.

44) Ibid. at 574.

45) Connick vs. Myers, 103 S.Ct. 1684, (1983).

46) Ibid. See also Givhan vs. Western Line Consolidated School District, 439, U.S. 410 (1979).

47) See Mt. Healthy City School District Board of Education vs. Doyle, 429 U.S. 274 (1977).

48) See e.g., Jawa vs. Fayetteville State University, 426 F. Supp. 218 (E.D.N.C., 1976); Clintwood vs. Feaster, 468 F. 2d 359 (4th cir., 1972); and Stasney vs. Board of Trustees 32 Wash. Ap. 239, 647 P. 2d 496 (1982).

49) Supra N. 17(a).

50) Ibid. It is also clear, however, that when legal governing bodies of public institutions are selected by voters, the Courts will apply the "one-man, one-vote" principle to ensure appropriate representation -- this, under the "equal protection" clause of the 14th Amendment. In Hadley vs. Junior College District of Metropolitan Kansas City, 397 U.S. 50 (1970) the Court held that the election of representatives to the Board of a Junior College District was unconstitutional, because a particular representational district contained approximately 60% of the total voters while it only elected 50% of the trustees.

51) Ibid.

52) Hamilton vs. Regents of the University of California, 293 U.S. 245 (1934).

53) Ibid. at 262.

54) Dunne, "The Supreme Court's Decisions," Mr. Dooley's Opinions, 1901.

55) In a more recent case with only specious similarities, the Court likewise upheld a congressionally-imposed requirement that male students certify their compliance with selective service registration requirements in order to achieve eligibility for federal financial aid. See Selective Service System vs. Minnesota Public Service Research Group, 104 S.Ct. 3348, (1984). This law had been challenged on the grounds that it violated the individual's 5th Amendment rights against compulsory self-incrimination.

56) Waugh vs. Board of Trustees of the University of Mississippi, 237 U.S. 589 at 597 (1915).

57) 393 U.S. 503 (1969).

58) 408 U.S. 169 (1972).

58a) Later, litigation arose over the rights of other "controversial" student organizations to institutional "recognition" -- notably organizations of gay students. The lower courts have generally given these organizations full protection, citing Healy vs. James as authority. See Stanley, "The Rights of Gay Student Organizations," 10 J. Coll. & Univ L., 397 (Winter, 1983-84).

59) 408 U.S. at 171.

60) Ibid. at 180.

61) Ibid. at 193.

62) Ibid. at 196-197.

63) Papish vs. Board of Curators of the University of Missouri, 410 U.S. 667 (1973).

64) Ibid. at 670.

65) 454 U.S. 263 (1981).

65a) The Court had also, on more than one occasion, been required to pass on whether other forms of public support to private institutions of higher education violated the "Establishment Clause" of the First Amendment. See Roemer vs. Board of Public Works of Maryland, 426 U.S. 736 (1976); Lemon vs. Kurtzman, 403 U.S. 602 (1971); Tilton vs. Richardson, 403 U.S. 672 (1971); Valley Forge Christian College vs. Americans United for Separation of Church and State, 454 U.S. 464 (1982).

66) 454 U.S. at 265.

67) 43 U S. (Howard 2) 127 (1844).

68) Berea College vs. Kentucky, 211 U.S. 45 (1908).

69) Who also dissented in Plessey vs. Ferguson, infra at N.80.

69a) Likewise, in Bryan vs. Board of Education of the Kentucky Conference of the Methodist Episcopal Church, South, (151 U.S. 639 (1894)), the Court refused to overturn an act of the Kentucky Legislature which authorized the Methodist Episcopal Church to remove the predecessor institution to Kentucky Wesleyan College from Millersburg, Kentucky, when the citizens of Millersburg had originally raised the funds for the purpose of establishing that institute in that place and inviting the Methodist Episcopal Church to take charge of the institution when it was established. The Court found that there "existed no contract ... for the continuence of the institution in Millersburg any longer than its useful and successful operation requires."

69b) 103 S.Ct. 2017 (1983).

69c) Ibid.

70) 354 U.S. 234 (1957).

71) Ibid.

72) 438 U.S. 265 (1978).

73) Ibid. at 312.

74) Supra. N.34.

75) 438 U.S. at 314.

76) For a more extensive treatment of this issue, see Finkin, "On Institutional Academic Freedom," 61 Texas L.R. Rev. 871 (Feb., 1983).

76a) See also, Note, "Testing the limits of academic freedom," 130 University of Pennsylvania L. Rev. 712 (1982) -- interpreting the Princeton University vs. Schmidt as raising a significant constitutional question of the First Amendment right of a private institution to control freedom of speech on its campus.

76b) See, for example, Schmeider, "Political Interference in Law School Clinical Programs: Reflections on Outside Interference and Academic Freedom," 11 J. Coll. & Univ. L., 179 (Fall, 1984), for an analysis of specific kinds of academic and constitutional problems that have arisen when states sought to restrict the types of litigation activities undertaken by clinical legal programs.

76c) See Chronicle of Higher Education, January 30, 1985.

77) 104 S.Ct. 1121 (1984).

78) Ibid. Problems have also been noted, however, in Federal intrusion in hiring decisions. Clearly constitutional implications are present. See NOTE, "Academic Freedom and Federal Regulation of University Hiring," 82 Harvard L. Rev. 879 (1979).

79) 104 S.Ct. ____ (1984).

80) See Katz, the First Amendment's Protection of Expressive Activity in the University Classroom: A Constitutional Myth" 16 U.C.D.L. Rev. 847, 862-3 (1983).

80a) See, Hofstadter and Metzger, The Development of Academic Freedom in the United States, New York, Columbia University Press, 1955.

80b) O'Neil, "Academic Freedom and the Constitution," 11 J. Coll. & Univ. L. 275, 280 (Winter, 1984).

80c) Ibid.

81) Plessey vs. Ferguson, 163 U.S. 537 (1896), upholding the principle of "separate but equal" accommodations for the races.

82) State of Missouri ex. rel. Gaines vs. Canada, 305 U.S. 337 (1938).

83) Sipuel vs. Board of Regents of University of Oklahoma, 332 U.S. 631 (1948).

84) McLaurin vs. Oklahoma State Regents for Higher Education, 339 U.S. 637 (1950).

85) 347 U.S. 483 (1954).

86) 339 U.S. 629 (1950).

87) Ibid. at 636.

88) 416 U.S. 312 (1974).

89) 438 U.S. 265 (1978).

90) Ibid. at 316.

91) Ibid. at 406.

92) 442 U.S. 397 (1979).

93) 441 U.S. 677 (1979).

94) 458 U.S. 1 (1982).

95) Note: The Supreme Court also ruled unconstitutional a statutory scheme under which New York excluded resident aliens from participating in a student financial assistance program. Reiterating that classifications which discriminated against aliens are "inherently suspect" under the 14th Amendment, the Court found no "compelling interest" on behalf of the state in barring such aliens from the benefits of the program in question. The Court also noted that "resident aliens are obligated to pay their full share of the taxes that support these assistance programs. There thus is no real unfairness in allowing resident aliens to an equal right to participate in programs to which they contribute on an equal basis.... The state is surely not harmed by providing resident aliens the same education opportunity it offers to others." See Nyquist vs. Mauclet, 432 U.S. 1 (1976).

96) 458 U.S. 718 (1982).

97) See e.g, Reed vs. Reed, 404 U.S. 71 (1971).

98) Kirchberg vs. Feenstra, 450 U.S. 455 (1981).

99) Citing Wengler vs. Druggists Mutual Insurance Company, 446 U.S. 1412 (1980).

100) Supra N.96.

100a) Justice O'Connor held in particular scorn the argument that the University's policy was intended to compensate women as victims of past discrimination. As the Court's opinion noted: "rather than compensate for discriminatory barriers faced by women, MUW's policy ... tends to perpetuate the stereotyped view of nursing as an exclusively woman's job." See also Olivas and Denison, "Legalization in the Academy: Higher Education and The Supreme Court," 11 J. Coll & Univ. L. 1 (Summer, 1984).

100b) In his dissenting opinion in Selective Service System vs. Minnesota Public Service Research Group, Supra N.17(a), Mr. Justice Marshall argued that the rights of "the poor" to equal protection were also violated by that statute, which denied federal financial aid to students (presumably less wealthy and therefore eligible) who refused to certify compliance with selective service registration laws. While the majority had little patience for this position, Marshall inveighed against what he termed this "callous indifference to the realities of life for the poor."

101) Supra N.24.

102) 559 -- Citing Ohio Bell Telephone Co. vs. Commission, 301 U.S. 292 (1937).

103) 350 U.S. at 559.

104) 408 U.S. 593 (1972).

105) 408 U.S. 564 (1972).

106) 408 U.S. at 603.

107) Meyer vs. State of Nebraska, 262 U.S. 390 (1923).

108) 408 U.S. at 572.

109) Citing Wisconsin vs. Constantineau, 400 U.S. 433 (1971).

110) 408 U.S. at 575.

110a) See Metzger, Supra 16 at P. 151 for useful history.

111) 412 U.S. 441 (1973).

112) Ibid. at 450. See also Goss vs. Lopez, 419 U.S. 565 (1975), involving the rights of pupils in public schools.

113) See, again, Dixon vs. Alabama State Board of Education, 294 F. 2d 150 (5th cir., 1967), cert. den., 368 U.S. at 930. Other questions have arisen as to the rights of students to privacy in their dormitory rooms and the standards for use of evidence in either institutional disciplinary proceedings or criminal prosecutions. See e.g, Washington vs. Chrisman, 455 U.S. 1 (1982); also, Olivas and Denison, Supra N. 100a at pp. 26-33.

114) 435 U.S. 78 (1978).

115) Ibid. at 82.

116) Ibid. at 86, and at N.3. In a sympathetic footnote, the Court also stated: "We conclude that, considering all relevant factors, including the evaluative nature of the inquiry and the significant and historically supported interest of the school in preserving its present framework for academic evaluations, a hearing is not required by the due process clause of the Fourteenth Amendment.

117) Ibid. at 90.

118) Ibid. at 90, citing Barnard vs. Inhabitants of Shelburne, 216 Mass. at 23, 102 n.e. at 1097.